No. 94-1344

Supreme Court, U.S.
FILED
MAR 9 1995
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In The

Supreme Court of the United States

October Term, 1994

JANET JESSUP, Administrator of the Gambling Control Division; MARC RACICOT, Governor of the State of Montana; JOE MAZUREK, Attorney General for the State of Montana; ANDY POOLE, Deputy Director of the Department of Commerce; JUDY BROWNING, Chief of Staff for Policy and Legal Affairs; and THE STATE OF MONTANA,

Petitioners,

vs.

THE BLACKFEET TRIBE OF THE BLACKFEET RESERVATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN OPPOSITION

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QUESTION PRESENTED

Whether Congress abrogated the state's Eleventh Amendment immunity from suit in federal court under its broad plenary authority to regulate Indian affairs in the enactment of the Indian Gaming Regulatory Act of 1988.

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OPINION AND ORDER BELOW

The Blackfeet Tribe instituted this action against the State of Montana pursuant to the provisions of the Indian Gaming Regulatory Act. The District Court dismissed the action on December 20, 1993, for lack of jurisdiction, holding that Congress did not abrogate the state's sovereign immunity in its enactment of the Act and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), 52 L. Ed. 2d 714, 28 S. Ct. 441, did not apply.

The Ninth Circuit Court of Appeals reversed and remanded the judgment of the District Court on the basis of *Spokane Tribe v. Washington*, 28 F.3d 991 (1994), *petition for cert. filed*, 63 U.S.L.W. 3209 (U.S. Aug. 29, 1994) (No. 94-357), entering this judgment on November 8, 1994.

STATEMENT OF THE CASE

Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988 in response to the 1987 Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). The Ninth Circuit there had held that Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 ed. and Supp. III), did not authorize California to enforce its gaming laws on Indian reservations. Affirming the decision of the Ninth Circuit Court, this Court held that because California did not prohibit gambling altogether, the gaming laws were not within the Public Law 280's grant of criminal jurisdiction. The case left Indian tribes whose reservations lay in states that permit gaming free of any state regulation.

In the enactment of IGRA, Congress created three classes of gaming. Class I consists of social games for minimal prizes and traditional Indian games. Class II includes bingo and similar

games of chance such as pull tabs and lotto. Class III includes all games not included in Class I or II. 25 U.S.C. § 2703 (6) - (8). In order to conduct Class III gaming on Indian lands, the interested tribe must enter into a tribal-state compact governing gaming with the state in which the Indian lands are located. 25 U.S.C. § 2710(d)(1)(c). This case involves Class III gaming that will be conducted in conformance with a tribal-state compact.

According to the statutory scheme of IGRA, an Indian tribe initiates the negotiation process by requesting the state in which the tribe's lands are located to enter into negotiations for a gaming compact. 25 U.S.C. § 2710(d)(3)(A). "Upon receiving such a request, the state shall negotiate with the Indian tribe in good faith to enter in such a compact." *Id.* If the state fails to negotiate in good faith, the statute confers jurisdiction on the federal district courts over "any cause of action initiated by an Indian tribe arising from a failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a tribal-state compact . . . or to conduct such negotiations in good faith." *Id.*, § 2710(d)(7)(A)(i). The court may then order the state and the tribe to reach an agreement within 60 days. *Id.*, § 2710(B)(iii). If the parties do not reach an agreement within the 60 day period after the court's order, the court is directed to appoint a mediator. If mediation fails, the Secretary of the Interior is authorized to impose regulations after consultation with the mediator. *Id.*, § 2710(7)(B)(iv) - (vii).

The Blackfeet Tribe and the State of Montana engaged in unsuccessful negotiations between 1989 and 1993. The Blackfeet Tribe filed this action pursuant to IGRA. Montana moved the court for a dismissal of the action asserting as a basis the Eleventh Amendment sovereign immunity from suit. The District Court granted the motion in December 1993, holding that it lacked jurisdiction over the state and its officials as Congress did not have the power to abrogate a state's sovereign immunity when

The Blackfeet Tribe appealed to the Ninth Circuit Court of Appeals. In November 1994, that court issued an order reversing the District Court for the reasons set forth in *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3209 (U.S. Aug. 29, 1994) (No. 94-357).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT IS CONSISTENT WITH THE DECISIONS OF THE EIGHTH CIRCUIT COURT, TENTH CIRCUIT COURT AND THE MAJORITY OF DISTRICT COURTS.

Although the Eleventh Circuit Court of Appeals in *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (Jan. 23, 1995), reached a different conclusion, the decision in this case is consistent with the decision of the Eighth Circuit Court of Appeals,, Ninth Circuit Court of Appeals and Tenth Circuit Court of Appeals in *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994); in *Cheyenne River Sioux Tribe v. South Dakata*, 3 F.3d 273 (8th Cir. 1993); and *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *petitions for cert. filed*, 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994).

The Ninth Circuit cited *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832), wherein this Court pronounced that the Indian Commerce Clause as set forth in the Constitution at Article I, Section 8, together with Congress' constitutional power to conclude treaties with Indian tribes provides Congress with all that is required for complete control over Indian affairs. The Ninth Circuit correctly reasoned that this broad grant of powers necessarily limits the power of the states and that unless Congress has authorized a state to apply its laws to Indian activities on a

reservation, the state has no authority to do so. *Antoine v. Washington,* 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); *Williams v. Lee,* 358 U.S. 217 (1959), 358 U.S. 217, 3 L. Ed. 251, 79 S. Ct. 269.

The Ninth Circuit also relied on this Court's decision in *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989), wherein the plurality opinion found that the states have necessarily "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce, including any aspect of that sovereignty which would stand in the way of this congressional power." *Id.* at 14, 109 S. Ct. at 2281.

Although the Eleventh Circuit in *Seminole Tribe* questions the vitality of *Union Gas*, the Ninth Circuit Court determined that it remains binding authority upon it. It further stated that even if *Union Gas* were to be subsequently overruled, Congress' broad plenary authority over Indian affairs would remain intact.

Consequently, Montana's assertion of sovereign immunity from suit despite Congress' intent and authority manifested in the Indian Gaming Regulatory Act would undermine the well established doctrine of broad plenary authority over Indian affairs as developed by this Court and relied on by the Ninth Circuit.

II.

THE NINTH CIRCUIT COURT OF APPEALS HAS CORRECTLY DETERMINED THAT CONGRESS, USING ITS BROAD PLENARY AUTHORITY OVER INDIAN AFFAIRS, EXERCISED PROPER AUTHORITY TO ABROGATE A STATE'S SOVEREIGN IMMUNITY IN ITS ENACTMENT OF IGRA.

The Ninth Circuit correctly interpreted the issue of congressional authority to abrogate a state's sovereign immunity. Furthermore, subsequently to the Ninth Circuit's decision in *Spokane Tribe*, the Tenth Circuit in *Ponca v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), examined the principle in *Dellmuth v. Muth*, 491 U.S. 223 (1989) and perceived no constitutional distinction between the plenary power conveyed by the Fourteenth Amendment, the Interstate Commerce Clause and the Indian Commerce Clause. This is consistent with the result of the Ninth Circuit Court's decision given the fact that this Court in *Union Gas* developed its opinion in terms of the Commerce Clause as a whole and did not sever the Interstate Commerce Clause and the Indian Commerce Clause from the overall clause.

CONCLUSION

For the reasons stated above, the Respondent Blackfeet Tribe respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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March 9, 1995